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No. 87-815

In the Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT G. CORACE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner received constitutionally adequate notice of the scope of his probation revocation hearing.

2. Whether petitioner's probation was properly revoked for his refusal to comply with certain instructions from probation officers.

3. Whether petitioner's right to confront and cross-examine witnesses was violated by the admission of hearsay at his probation revocation hearing.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1) is reported at 825 F.2d 412 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1987. A petition for rehearing was denied on September 18, 1987. The petition for a writ of certiorari was filed on November 17, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on five counts of mail fraud, in violation of 18 U.S.C. 1341, and six counts of making false statements to the government, in violation of 18 U.S.C. 1001. He was sentenced to two years' imprisonment, all but six months of which was suspended. He was also placed on probation

for three years following the term of imprisonment, and he was fined a total of $2,500. After serving his six-month sentence, petitioner began his term of probation in October 1985 (C.A. App. 63). On June 23, 1986, following a hearing, the district court concluded that petitioner had violated conditions of his probation and sentenced him to imprisonment for the remainder of his two-year term (Pet. App. 6-10). The court of appeals affirmed (Pet. App. 1).

1. Petitioner's probation was subject to a number of conditions. Three are relevant to this case. Condition 3 stated: "You shall work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. When out of work, you shall notify your probation officer at once. You shall consult him prior to job changes." Condition 4 stated: "You shall not leave the judicial district without permission of the probation officer." Condition 6 stated: "You shall follow the probation officer's instructions." Pet. 4; Pet. App. 7.

When petitioner was released from prison in October 1985, he requested permission to move to Miami, where he had lived previously and had hope for employment. That permission was granted even though petitioner's probation officer was based in Detroit. C.A. App. 55, 60-61, 66, 96-97, 104. The Miami probation office agreed to perform a "pre-transfer investigation" to determine whether to accept a permanent transfer of supervision from the Detroit office and, as a courtesy to the Detroit office, to supervise petitioner until the investigation was complete. *Id.* at 63-64, 67. Under this arrangement, petitioner continued to be officially under the supervision of his Detroit probation officer (*id.* at 66).

Petitioner refused to cooperate with the Miami probation office's efforts at supervision (Pet. App. 9-11; C.A. App. 72-74). He refused to provide any documentation to confirm his residency (C.A. App. 72). More important, he refused to furnish any information that could verify his

employment, even though he was instructed to do so. Petitioner, who is a Michigan attorney suspended from practice, merely asserted that he was employed doing legal research. He said that he roamed from one law library to another, and he gave only the name of a company with which he claimed to be associated. He refused to provide any further information, including the names of any attorneys for whom he did research. Pet. App. 7-8; C.A. App. 87. In addition, petitioner refused to file financial forms, to keep daily logs of his activities, or to contact a job placement officer, as he was directed to do (C.A. App. 28, 73-74, 84-85, 87, 105-107).

Because of petitioner's refusal to cooperate, the Miami probation office on February 6, 1986, instructed him to report to Detroit (C.A. App. 22, 73). Petitioner was warned that his failure to report would be considered a probation violation (*id.* at 22). Based on the intercession of the Detroit office, however, the Miami office gave petitioner another chance to comply with its supervision requests. When the Miami probation officer subsequently asked petitioner to report for a meeting (*id.* at 74-77), petitioner responded with a letter that challenged the various instructions described above and purported to set the terms under which he would agree to be supervised (*id.* at 27-31). Two days later, on April 9, 1986, the Miami probation office informed petitioner by telephone that it had decided not to accept a permanent transfer of supervision from the Detroit office because of petitioner's failure "to comply with the instructions of this office" (*id.* at 22, 32, 74-78). The Miami office then wrote a letter to the Detroit office returning full supervisory control to that office (*id.* at 77-78, 104).

On April 18, 1986, petitioner received a letter from his Detroit probation officer. The letter stated that the Miami office had reported petitioner's refusal to "abide by the conditions of probation as set forth by the Probation

Office in the Southern District of Florida." The letter instructed petitioner to return to the Eastern District of Michigan by June 2, 1986, and it warned him that failure to comply might result in probation revocation. See C.A. App. 19, 88.

Petitioner refused to comply with the Detroit officer's instructions (C.A. App. 83, 48). Instead, on June 5, 1986, petitioner sent a letter (with attachments) to the sentencing court in the Eastern District of Michigan (*id.* at 19-26). The letter asserted that the Miami probation office's instructions to him "from the outset" had "exceeded both the spirit and the letter of the terms of [his] probation" (*id.* at 21); it acknowledged that "my resistance of what I consider unlawful directions of my probation officers may lead to my re-incarceration" (*id.* at 20); and it explained that, in his view, the Miami office's overreaching legally justified his refusal to move back to Detroit as he had been ordered (*id.* at 20, 24). The letter also expressed petitioner's willingness to appear in Detroit "for any hearing the Court shall desire to conduct * * * to determine whether there has been a 'violation of probation' " (*id.* at 25).

The court responded by instructing petitioner to report on June 23, 1986, for "disposition of the matters raised and related in" the June 5 letter from petitioner (C.A. App. 34 (petitioner's June 18, 1986, letter of acknowledgement)). On June 19, 1986, the Detroit probation office filed a letter with the court alleging that petitioner had violated Condition 3, in that he had refused to prove his employment; Condition 4, in that he would not return to Detroit, which retained official jurisdiction over petitioner; and Condition 6, in that he refused to follow the Miami probation office's instructions. Pet. App. 12-14.

2. At the start of the probation revocation hearing, petitioner, having seen the June 19th letter, informed the court that he saw little need for the government to put on

its proof because he had "admitted the facts upon which this hearing is based" (C.A. App. 56-57, 58). But petitioner and the government could not agree to a stipulation of facts, so the government put on its case. The Detroit probation officer was the sole witness for the government. Letters and communications from the two probation offices and from petitioner were introduced to support the government's claim of probation violations. The government observed that petitioner "has not really challenged most of the violations that are alleged" (*id.* at 101) and argued that probation revocation was the only proper remedy, because unsupervised probation was inappropriate, the Miami office had declined supervision, and petitioner flatly refused to relocate to Detroit (*id.* at 102-103). The government attorney explained that return to custody was the only proper alternative. As the government attorney explained (*id.* at 103), "we don't request that except as a last resort, but I almost think [petitioner] is pushing that on the Court."

Petitioner presented no witnesses or evidence, but asserted a "[l]egal defense" (C.A. App. 97). He claimed that the issues other than his refusal to relocate were mere "makeweight" (*id.* at 98) and "beg[ged] the question" (*id.* at 100) and that the fundamental issue was the Miami office's authority to refuse to accept supervision and to "control a probationer's domicile" (*ibid.*). On that issue, petitioner argued, the Miami office had acted beyond its legal authority.

After a review of the evidence, the district court found (Pet. App. 6-11) that petitioner had violated two of the three probation conditions at issue in the proceeding. First, the court found that petitioner had violated Condition 3, which required that he be employed or, if not, that he inform his probation officer. After noting petitioner's refusal to supply any information that could confirm his alleged employment doing legal research (*id.* at 7-8), the

court found that petitioner had failed to adduce any evidence at all that he was working regularly and supporting his dependents or, if he was out of work, that he notified any probation officer of that fact (*id.* at 9-10). Second, the court found that petitioner had violated Condition 6, which required obedience to probation officers' instructions, because petitioner had refused to comply with a number of specific directives of the Miami probation officers and, more generally, had been uncooperative (*id.* at 8, 10).[1] Although noting that these violations might be thought "technical" (*id.* at 10), the district court observed that petitioner was "attempting to force the Court to impose an unsupervised probation and is on a headlong collision course with the Court" (*id.* at 11). Because of petitioner's "defiance" (*ibid.*), the court revoked his probation and ordered him returned to the custody of the Attorney General for the remainder of his original two-year sentence (*ibid.*). The court of appeals affirmed on the district court's opinion (*id.* at 3).

ARGUMENT

Petitioner raises three fact-specific challenges to his probation revocation. No published decision is presented for this Court's review. The court of appeals' rejection of petitioner's arguments is correct and does not conflict with any decision of this Court or of any other circuit. Review by this Court is therefore unwarranted.

1. Petitioner first contends (Pet. 10-13) that he did not receive constitutionally adequate notice of the scope of the hearing held on June 23, 1986, because he did not know that Conditions 3 and 6 would be at issue. But petitioner,

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[1] The court found that petitioner had not violated Condition 4, which required that he not leave the judicial district without permission. The court observed that, although petitioner refused to return to Detroit, he went to Florida with the court's knowledge (Pet. App. 10).

who received the June 19th letter specifying the charged probation-condition violations before the hearing began, did not complain about inadequate notice prior to or at the hearing. He asserted that the allegations concerning Conditions 3 and 6 were "makeweight" and "beg[ged] the question" (C.A. App. 98, 100), but he never suggested that any of the allegations came as a surprise or could not lawfully be considered in the proceeding, or that he was unprepared to respond to them. Indeed, at the outset of the hearing, petitioner, having read the allegations, expressed no objection to their inclusion in the proceeding and stated that he had already admitted the truth of the factual allegations and saw no need for the government to put on proof (*id.* at 56-58).

In any event, as his failure to raise the notice issue at the hearing indicates, petitioner had adequate notice of the three issues that were resolved in the revocation hearing. Petitioner's own letters preceding the hearing specifically complained about the allegedly oppressive instructions of the Miami probation officers, including their request for a detailed financial history and for a daily log of his activities (see C.A. App. 19-26, 27-31). Although petitioner might have believed that the revocation hearing would focus on his refusal to return to Detroit, the pre-hearing communications made clear that the hearing was to address all of the incidents manifesting petitioner's refusal to cooperate with the Miami office's efforts at supervision. In addition, petitioner has not identified any way in which he was prejudiced by the alleged lack of adequate notice. Not only has he never disputed that he was guilty of the probation-condition violations, but he has never pointed to any evidence or arguments that he was prevented from putting forth by the alleged inadequacies in the notice he received.

2. Petitioner also contends (Pet. 18-21) that it was a violation of his due process rights for the district court to

revoke his probation based on his refusal to follow the directives of the Miami probation office. Those directives, however, were entirely proper. The Miami office's orders concerning verification of employment, daily logs of activity, and contact with a job placement officer were issued as a result of petitioner's evasion of questions concerning his employment. Moreover, they were entirely reasonable means of implementing his probation conditions—notably, Condition 3, that petitioner work regularly or report to the probation officer if he is not working. The probation order in this case, by requiring petitioner to follow the instructions of his probation officer (Condition 6), obviously contemplated that further instructions would be given to implement the express terms of the probation order and to maintain effective supervision. Probation officers have traditionally been entrusted with broad discretion and power to supervise probationers in their rehabilitation (*Griffin* v. *Wisconsin*, No. 86-5324 (June 26, 1987), slip op. 5-6; *Gagnon* v. *Scarpelli*, 411 U.S. 778, 784 (1973)), and financial reporting requirements are important and common probation conditions. See, *e.g.*, *United States* v. *Rodgers*, 588 F.2d 651, 653 (8th Cir. 1978); *United States* v. *Pierce*, 561 F.2d 735 (9th Cir. 1977), cert. denied, 435 U.S. 923 (1978).

It was likewise proper for the district court to revoke petitioner's probation for refusing to comply with the Miami office's instructions, for such defiance constituted a violation of the probation condition requiring that petitioner follow his probation officers' instructions. See *United States* v. *Babich*, 785 F.2d 415, 418 (3d Cir. 1986), cert. denied, No. 85-6893 (Oct. 6, 1986) (failure to fulfill reporting requirement is sufficient to revoke probation); *Higdon* v. *United States*, 627 F.2d 893, 900 (9th Cir. 1980) (revocation of probation for noncompliance with reporting requirement); *United States* v. *Rodgers*, 588 F.2d at 653-654 (same). Petitioner's refusal to comply with the in-

structions concerning verification of his employment status also left the court with no choice but to conclude that petitioner had violated the condition requiring that he be employed or report his unemployment to his probation officers. Moreover, contrary to petitioner's suggestion (Pet. 20), petitioner had ample notice, as we have explained, that his defiance of the Miami office's directives might lead to probation revocation, and not merely to the Miami office's refusal to accept supervision of petitioner. See C.A. App. 19, 25, 88.

3. Finally, petitioner challenges (Pet. 13-18), as a denial of his Confrontation Clause rights, the admission at the probation-revocation hearing of certain letters from the Miami probation officers to the Detroit probation officer. This claim is without merit.

In *Morrissey* v. *Brewer*, 408 U.S. 471, 489 (1972), and *Gagnon* v. *Scarpelli*, 411 U.S. at 782-783 n.5, 789, this Court held that the process due at a revocation hearing was not to be equated with that due at a criminal trial and, in particular, that "the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial" (*Morrissey*, 408 U.S. at 489). See also Fed. R. Evid. 1101(d)(3) (hearsay evidence admissible at probation hearing); Fed. R. Crim. P. 32.1(a)(2) advisory committee note ("the usual rules of evidence need not be applied" and court may consider documentary evidence including letters that would not be admissible in a criminal trial). The lower courts are in agreement that hearsay evidence is admissible if, in the circumstances of a particular case, it is demonstrably reliable. See, *e.g.*, *United States* v. *McCallum*, 677 F.2d 1024, 1026-1027 (4th Cir.), cert. denied, 459 U.S. 1010 (1982); *Prellwitz* v. *Berg*, 578 F.2d 190, 191-193 (7th Cir. 1978); *United States* v. *Pattman*, 535 F.2d 1062, 1063-1064 (8th Cir. 1976); *United States* v. *Miller*, 514 F.2d 41, 42-43 (9th Cir. 1975).[2]

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[2] *United States* v. *Bell*, 785 F.2d 640 (8th Cir. 1986), which petitioner cites as in conflict with the decision in this case, articulated the

The letters from the Miami probation office were demonstrably reliable and were well within the bounds of the hearsay statements found admissible in the cases cited above. Like the police reports in *United States* v. *Bell*, 785 F.2d 640 (8th Cir. 1986), the letters of the Miami probation officers were corroborated by the letters and admissions of petitioner. Petitioner's letters showed that the probation officers had failed to verify his residence and that he had refused to provide documentation (C.A. App. 72); that he could not be contacted during the day at work (*id.* at 36, 87); that he refused to return to Michigan when he was instructed to do so (*id.* at 20, 25, 83); that he refused to file financial verification reports and daily logs as instructed (*id.* at 28); that he refused to give probation officers any information about his employment other than the name of the corporation through which he allegedly did business (*id.* at 87); and that he failed to meet with the officers when they requested a meeting (*id.* at 75-76). Neither at the hearing nor in this Court has petitioner advanced any reason to doubt the reliability of the charges made in the Miami office's letters. Indeed, petitioner stated at the outset of the probation-revocation hearing that he did not dispute the factual allegations in the petition for revocation, which included all the allegations on which the eventual revocation decision was based.

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same principle in the passage that petitioner quotes (Pet. 16) and expressly permitted the admission of hearsay evidence (police reports) that it found reliable (785 F.2d at 644). And *United States* v. *Cain*, 615 F.2d 380 (5th Cir. 1980), also cited by petitioner (Pet. 16), involved a criminal trial, not a revocation proceeding. The courts have had no difficulty distinguishing reliable from unreliable hearsay on the particular facts presented to them.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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